

DISTRICT OF COLUMBIA
OFFICE OF ADMINISTRATIVE HEARINGS
941 N. Capitol Street, NE, Suite 9100
Washington, DC 20002

DISTRICT OF COLUMBIA
DEPARTMENT OF CONSUMER AND
REGULATORY AFFAIRS
Petitioner,

v.

METROPOLITAN REHABILITATION AND
RECOVERY CENTER
Respondent.

Case Nos.: CR-I-07-S701028
CR-I-07-S701029
(Consolidated)

FINAL ORDER

I. Introduction

This case arises under the Civil Infractions Act of 1985, as amended (D.C. Code, 2001 Ed. §§ 2-1801.01 *et seq.*) and 11 District of Columbia Municipal Regulations (“DCMR”) 3203. The Government served Notices of Infraction (S7010128 and S701029) (“NOI”) on August 27, 2007. The Government charged Respondent, Metropolitan Rehabilitation and Recovery Center, with violating 11 DCMR 3203, because Respondent had no Certificate of Occupancy (“C of O”) for its physical therapy clinic located at 1905F 9th St., NE (“Property”).¹ In NOI S701028, the Government alleged that the violation occurred on April 18, 2007. In NOI S701029, the Government alleged that the violation occurred on August 27, 2007. The Government sought a \$2,000 fine for each NOI.

¹ 11 DCMR 3203.1 requires, in pertinent part:

[N]o person shall use any structure, land, or part of any structure or land for any purpose other than a one-family dwelling until a certificate of occupancy has been issued to that person stating that the use complies with the provisions of this title and the D.C. Construction Code, Title 12 DCMR.

On August 27, 2007, Respondent filed an answer with a plea of Deny. A hearing was held on February 21, 2008. The Government was represented by David Lang, Civil Infractions Advocate, and Respondent by Robert Davis, Owner. During the hearing, Respondent moved to change its plea to Admit with Explanation. I granted the motion. Based on the evidence received at the hearing and the entire record herein, I make the following findings of fact and conclusions of law.

II. Findings of Fact

1. Respondent's plea of Admit with Explanation establishes that on August 27, 2007, the Respondent violated 11 DCMR 3203, as cited in NOI S701029.

2. In January 2007, Respondent leased an existing physical therapy clinic from Capital Care, Inc. Respondent assumed responsibility for treating patients formerly treated by Capital Care. At the time the parties entered into the contract transferring control of the business to Respondent, Mr. Davis realized that Capital Care did not have a C of O for the site. The parties signed a separate contract that required Capital Care to obtain the C of O on Respondent's behalf.

3. Capital Care did not satisfy its contractual obligation to obtain the C of O. On or about February 1, 2007, Respondent filed the application for the C of O. The Department of Consumer and Regulatory ("DCRA") gave Respondent conflicting instructions on how to complete the application process and then lost Respondent's application.

4. Inspector Meredith with DCRA inspected the Property on April 18, 2007. Mr. Davis showed Inspector Meredith the papers he had received from DCRA establishing that Respondent had applied for a C of O. Inspector Meredith told Mr. Davis that Respondent had to get a C of O

to avoid an infraction, but at that time Inspector Davis did not issue an NOI. In May 2007, having found Respondent's application, DCRA approved the electric grid at the Property.

5. On August 31, 2007, DCRA instructed Respondent that he was required to obtain a Certificate of Need ("CON") from the Department of Health ("DOH") before his C of O could be issued. This news surprised Mr. Davis as he operates (or had operated) a physical therapy clinic on Minnesota Ave., NE for years with a C of O, but not a CON.

6. On August 26, 2007, Inspector Meredith re-inspected the Property and discovered that Respondent had not obtained the C of O.

7. On August 27, 2007, Inspector Meredith met with Mr. Davis. During this meeting, Mr. Davis documented everything he had done to obtain the required C of O. As Respondent had not yet been able to secure a C of O, Inspector Meredith issued both NOI S701028 and S701029.

8. Respondent is working with DOH to obtain the CON, but the process is not yet complete.

III. Conclusions of Law

Respondent violated 11 DCMR 3203, as charged in NOI S701029. The violation is a Class 1 infraction punishable by a maximum \$2,000 fine for the first offense. 16 DCMR 3201.1(c); 16 DCMR 3312.1. The Government has requested fines totaling \$4,000 (\$2,000 for each NOI).

Respondent's uncontroverted version of the facts counsel against imposing the maximum fine. Respondent established that it had applied for a C of O on or about February 1, 2007, that

DCRA gave Mr. Davis conflicting advice on how to complete the application process, had lost its application for months, and waited until approximately August 31, 2007, to inform Respondent of the requirement to obtain a CON from DOH.

Furthermore, I am unpersuaded by the Government's argument that Respondent's failure to obtain the C of O after the April 18, 2007, inspection constituted a "continuing violation," such that it was proper for Inspector Meredith to simultaneously issue two NOIs for the same violation, on the premise that the dates of the infractions were different. After the April 18, 2007, inspection Respondent was operating on the premise that Inspector Meredith would not issue a citation if Mr. Davis continued to pursue, in good faith, the C of O. It was not until August 27, 2007, that Inspector Meredith informed Respondent that the passage of time itself warranted issuance of citations, one for each inspection date (April 18, and August 27, 2007). Inspector Meredith may have been correct in reaching this decision. However, as Inspector Meredith told Respondent that he would not issue an NOI after the April 18, 2007, inspection, so long as Mr. Davis made good faith efforts to obtain a C of O, and Mr. Davis did exactly that, I conclude that their agreement amounted to a settlement of the first infraction. If Inspector Meredith had issued an NOI shortly after the April 18, 2007, inspection, the circumstances apparently would have warranted a re-inspection and issuance of a second NOI, if necessary. As that did not happen here, I dismiss NOI S701028.

I conclude that Respondent has shown mitigating factors to reduce the fine. Respondent's acceptance of responsibility, corrective action taken, and good faith efforts to comply with the governing rules factor into my decision to reduce the fine. I hereby impose a fine of \$1,250.

IV. Order

Based upon the above findings of fact and conclusions of law, it is this 6th day of March 2008

ORDERED that NOI S701028 is **DISMISSED WITH PREJUDICE**; it is further

ORDERED that Respondent Metropolitan Rehabilitation and Recovery Center is **LIABLE** for violating 11 DCMR 3203, as charged in Notice of Infraction No. S701029; it is further

ORDERED that Respondent shall pay a fine in the amount of **ONE THOUSAND TWO HUNDRED FIFTY DOLLARS (\$1,250)** in accordance with the attached instructions within twenty (20) calendar days of the date of mailing of this Order (15 calendar days plus 5 days for service by mail pursuant, to D.C. Code, 2001 Ed. §§ 2-1802.04 and 2-1802.05); it is further

ORDERED that, if Respondent fails to pay the above amount in full within 20 calendar days of the date of mailing of this Order, by law, interest shall accrue on the unpaid amount at the rate of 1½ % per month or portion thereof, beginning with the date of this Order, pursuant to D.C. Code, 2001 Ed. § 2-1802.03(i)(1); it is further

ORDERED that failure to comply with the attached payment instructions and to remit a payment within the time specified will authorize the imposition of additional sanctions, including the suspension of Respondent's licenses or permits, pursuant to D.C. Code, 2001 Ed. § 2-1802.03(f), the placement of a lien on real or personal property owned by Respondent, pursuant to D.C. Code, 2001 Ed. § 2-1802.03(i), and the sealing of Respondent's business premises or work sites, pursuant to D.C. Code, 2001 Ed. § 2-1801.03(b)(7); it is further

ORDERED that the appeal rights of any person aggrieved by this Order are stated below.

March 6, 2008

/SS/
Jesse P. Goode
Administrative Law Judge